Supreme Court, U.S.
FILED
95-76 JUL 11 1995

NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES

October Term, 1995

LARRY L. FAIRCHILD, d/b/a

FAIRCHILD WASTE CONTROL

Petitioner

vs.

BUENA VISTA CHARTER

TOWNSHIP, ET AL.,

Petition for writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY L. FAIRCHILD
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Petitioner Pro Se

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether in a 42 U.S.C.A. 1983, 1985, 1986 violation of a person's Civil and Constitutional Rights, along with state tort claims, the claim of defense is MCL 691.1407, Governmental Immunity, the court granting immunity on attorney arguments only is not consistent with the intent of Congress.

2. Whether in a defense based upon Michigan Complied Law 691.1407, for allegations against a Government and governmental employees for violation of Civil And Constitutional Rights under 42 U.S.C.A. 1983, 1985, and 1986 and state tort claims, the trial court's equitable power, as expressed in the statute, does not extend to granting governmental immunity where no testimony, affidavits, sworn statements, or lack of any evidence that the government was performing a govermental function, was not presented to the court.

3. Whether this Court should resolve a conflict in decisions by the Courts on the question of whether governmental immunity can be granted without first establishing that a governmental function was being performed.

4. Whether this Pro Se claim was adjudicate properly.

PARTIES TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. Larry L. Fairchild, d/b/a Fairchild Waste Control, Plaintiff/Appellant.

2. Buena Vista Charter Township, Thomas Lynch III, Robert Parrott, Robert Parent, Dennis Williams, Julius Boarden, and Steven Bennett, Defendant/Appellees.

TABLE OF CONTENTS

Page

THE QUESTIONS PRESENTED FOR REVIEW . . . i

PARTIES TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS BY OTHER COURTS 1

JURISDICTIONAL GROUNDS 3

STATUTORY PROVISIONS 4

STATEMENT OF THE CASE 5

The Course of Proceedings in the Courts below 5

Statements of Facts 8

ARGUMENT AND AUTHORITIES ON REASONS FOR GRANTING A WRIT OF CERTIORARI 13

PETITIONER'S FIRST ARGUMENT:
A judgment granting Governmental Immunity based on attorney argument is not consistent with the intent of congress 13

PETITIONER'S SECOND ARGUMENT:
The equitable power of the district court does not extend to grant governmental immunity in a MCL 691.1407 defense where no defense by the party is shown . . 19

PETITIONER'S THIRD ARGUMENT:
The decision of the Court of Appeals for the Sixth Circuit is in conflict with the decisions of other appellate courts on this issue 21

PETITION'S FOURTH ARGUMENT:
The decision of the Court of Appeals for the Sixth Circuit of Plaintiff Pro Se Complaint was improperly consider 22

CONCLUSION 23

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit . A-1-5

Judgment of the United States District Court for the Eastern District of Michigan A-1-7

Findings of Fact and Conclusions of Law by the Trial Court A-8-45

TABLE OF AUTHORITIES

Page

Cases

Signnore v City of Mckeekport, Pa. 690 F.Supp. 200, affirmed 877 F. 2d 54 22

STATUTE

28 U.S.C. 1331 (a) 3

42 U.S.C. 1983 . . . . . 3-4-5 18-21-23

42 U.S.C. 1985 3

42 U.S.C. 1986 3

Mich. Comp. Law

MCL 691.1407 . . . . . 13-15-19 21-23

MCR 12 (c) 6-20

OPINIONS BY OTHER COURTS

The opinion of the United States Court of Appeals from which is the subject of this Petition was rendered on April 12, 1995, and is titled Fairchild v. Buena Vista Charter Township, et al., which was not recommended for a full text publication.

A judgment was entered in Petitioner's suit styled Fairchild v. Buena Vista Charter Township, et al., on November 29, 1993 by the United States District Court for the Eastern District of Michigan in Civil Action No. 92-CV-10085.

The findings of fact and conclusions of law of the United States District Court for the Eastern District of Michigan in Action No. 92-CV-10085 was issued by mail by the court on November 29, 1993.

All of these opinions and findings are reproduced in the Appendix to this Petition.

JURISDICTIONAL GROUNDS

Petitioner seeks review of a judgment of the Court of Appeals for the Sixth Circuit entered on April 12, 1993. No Petition for rehearing was filed.

Jurisdiction in the trial court was based on 28 U.S.C. Section 1331(a) and 42 U.S.C. Section 1983, 1985 and 1986 and the Federal provisions involved, include: Article III, Section 2 and Article IV Section 2, the First, Fourth, Seventh and Fourteenth Amendments. Jurisdiction in the Court of Appeals was under Title 28 U.S.C. Section 1331(a) and 42 U.S.C. Section 1983.

This Court has Jurisdiction pursuant to Title 28, United State Code, Sections 1983, 1985 & 1986. There is a conflict of decisions among the circuit courts of appeal on the issue decided by the court below.

STATUTORY PROVISIONS

Section 1983 of the Civil Rights Act, Title 42, U.S.C., ss 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to be the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Course of Proceedings in the Courts Below

Plaintiff, Larry L. Fairchild, who is the Appellant in this Court, filed a complaint in February 1992 with the United States District Court, Eastern District of Michigan, (hereinafter "U.S.D.C.") against a governmental agency and certain individual employees of said agency. The suit sought judgment against all defendants under title 42 U.S.C. 1983, and under the tort laws of the State of Michigan.

Approximately six months after the suit was initiated, the defendants attorney filed for dismissal on the grounds that the plaintiff failed to state a claim in which relief can be granted and that the defendants were protected by governmental immunity.

Magistrate Judge Binder recommend to the USDC to dismiss all claims of Civil and Constitutional Rights on the grounds of MCR 12 (c) and he recommended government-Al immunity for the defendants against Plaintiff's state tort claims. Only the trespass claim was dismissed without prejudice so as plaintiff could file that claim in state court if he so chose to do so. Plaintiff filed his objections. The USDC accepted the recommendations and so Order accordingly.

Fairchild timely pursued an appeal. On Fairchild's appeal to the United States Court of Appeals for the Sixth Circuit, the panel, by decision dated April 12, 1995, affirmed the judgment for the reasons set forth in the magistrate judge's report and recommendation filed on April 8,

1993, as adopted by the district court in its order filed on November 29, 1993. (See Appendix A 1-5)

STATEMENT OF FACTS

The plaintiff below, Larry L. Fairchild, is the owner of Fairchild Waste Control, a waste recycling company located in Buena Vista Township. On October 30 1991, plaintiff was being inspected by the Michigan Department of Natural Resource who had a warrant in their possession to search certain things if found. While the MDNR was detaining plaintiff in their inspection, all defendants in this case arrived at plaintiff's place of business and claimed they wanted to do a routine inspection. Plaintiff requested that all defendants leave his property and come back another time for he was already detained in an inspection. The individual defendants did not have a warrant in their possession. Plaintiff recognized some of the defendants who worked for Buena Vista Township. Plaintiff's business is not open to the public.

Plaintiff demanded for the defendants to leave his property, for he considered them to be trespassing. The defendants refused to leave plaintiff's property.

Plaintiff requested a Buena Vista Police Office with the name tag on Steven Benneth to please remove all the individuals defendants from his property for they are trespassing. Defendant Bennett responded, "If you don't shut-up, I am going to arrest you for obstruction of justice." At that time Defendant Thomas Lynch III stated to plaintiff, "We're here to put you out of business, we don't like you and your out of here." All defendants stayed on plaintiff's property and while plaintiff was being detained in his other inspection, they walked all over the property, when into each and every room, eavesdrop on conversation between the MDNR and plaintiff. All the while trying to find something to put plaintiff out of business.

After over three (3) hours on plaintiff's property, they decided to have his utilities terminated. Defendant Parrott, the fire chief for Buena Vista Township, call Consumer Power Co. and demanded for them to get over here and disconnect all utilities on this property.

Plaintiff upon hearing that the defendants were shutting off his utilities requested a reason why. Chief Parrot responded "its Buena Vista's policy to do what ever it feels like and he doesn't have to give any reason right now." That all though no reason was officially given, these defendants later claimed the utilities were shut off because of an electrical code violation. Plaintiff in good faith stipulated to make some changes. Defendants acted in bad faith and refused to ok the changes. Although no citation for any electrical code violation was ever issued to plaintiff, his utilities stayed off for over

6 months, causing sever damage and emotional distress to plaintiff.

Plaintiff later obtained a document from Consumers Power Co. that reported defendants claimed on October 30, 1991 to Consumers Power Co. that a fire was on plaintiff's property and all utilities must be immediately terminated.

Plaintiff filed suit on February 28, 1992, charging these defendants with violation of his civil and constitutional rights, by, among others, persons acting under color of state law. Violation of plaintiff rights under 42 U.S.C. Sections 1983, 1985 and 1986 which include, Article III, Section and Article IV, Section 2, the First, Seventh and Fourteenth Amendments. Defendants attorney on July 7, 1992, filed for motion to dismiss on the grounds that plaintiff did not state a claim on which relief could be granted and that governmental immunity protects the wrongs committed by these defendants. A

protective order was also issued at that time barring plaintiff from any discovery of these defendants.

A hearing was held by Magistrate Binder and a Report & Recommended was issued. Recommending to dismiss all of plaintiff's claims and that the claim of trespass be dismissed without prejudice so that the plaintiff could file that claim in state court if he so chooses. Granting governmental immunity to the defendants on the State tort claims based on attorney argument only. Plaintiff filed his objections. On November 29, 1993, Judge Robert H. Cleland accepted the magistrate recommendations and issued his Order so accepting the recommendations.
(Finding of Fact and Conclusions of Law, Appendix A 6-45

ARGUMENT AND AUTHORITIES ON REASONS FOR GRANTING A WRIT OF CERTIORARI

PETITIONER'S FIRST ARGUMENT

A judgment granting governmental immunity based on attorney argument is not consistent with the intent of Congress.

The intent of Congress in enacting MCL 691. 1407, the Governmental Immunity Act, was to protect the government and governmental agents if performing a government function within the guiding statutes. The statute states in applicable part:

1. Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the goverment agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed a modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965,

which immunity is affirmed.

2. Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or volunteer while acting on behalf of a govermental agency if all of the following are met:

(a). The officer, employee, member, or volunteer is acting or responsibly believe he or she is acting within the scope of his or her authority.

(b). The governmental agency is engaged in the exercise or discharge of a governmental function.

(c). The officer's, employee's, member's or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

Mich. Comp. Law ss 691.1401 gives governmental immunity only if all these requirements are met, and does not clothe the government or its agents with immunity if any one of these requirements are not met.

The first requirement to be clothe with immunity is that the agency and its agents must be performing a statutory governmental function.

Plaintiff claims defendant, while acting under color law, did conspire with

others, to harm him. That the defendants committed trespass and while trespassing they did an illegal search and seizure and damaged him. Their actions resulted in putting him out of business for over eight months. That their illegal activities amounted to fraud when they claimed a fire here, when in fact no fire existed, nor was there any electrical code violation.

The case at bar lacked any evidences as to what function the defendants were performing. There were no affidavits, no sworn statements, or any testimony whatsoever on the defendants behalf to establish any proof of a governmental function. Congress never intended that governmental immunity would be granted by the mere claiming and pleading of the attorneys.

The Courts cannot give immunity to government and its agents by the mere asking for it. To do so would be denying to the people their rights under the U.S. Constitution, their Civil Rights under U.S.C. 42 1983, 1985 and 1986 and their rights under the judicial procedure established by this very Court. It was never intented by Congress to deny any U.S. Citizen access to the courts, or to grant immunity for government actions by merely claiming gov. immunity, or for the Courts to violate their own rules and procedure on evidences. Mich. Comp. Law ss 691.1407 specifies the criteria that the government has to be engaged in to be clothe with immunity. The Rules of Evidences specifically lays out the criteria needed to establish such proof. And if the courts continue to grant immunity on

attorney hearsay, then they are violating the very institution of justice that they had establish. In truth the lower courts are telling plaintiff and the public to go out and perform your own Self Help, any way you have to, to receive justice and vindication as aloud in 42 U.S.C. 1983 under " or other proper proceeding for redress." Under present rulings, seeking justice and vindication from wrongful acts committed by the government is not within the intent of the Court system, and is being denied to the people. In truth the Courts have failed the American People. The judicial system is a big factor why more and more Americans are into groups such as the Militias, seeking as definded in 42 U.S.C.A. 1983; " or other proper proceeding for redress".

PETITION'S SECOND ARGUMENT

The equitable power of the district court does not extend to grant governmental immunity in a MCL 691.1407 defense, where no defense was presented by the party.

The opinion of the district court in granting governmental immunity to all defendants was based on hearsay. Not one piece of evidence was presented to the court to show that the defendants were engaged in any governmental function or that they were acting on behalf of any government. Plaintiff had presented to the court affidavits to back up his claims of the alleged wrongful acts committed by all these defendants.

The defendants had ample time to present the court with affidavits, sworn statement, or any other evidences to show at a minimum, what function, if any, they performed. The district court must accept all factual

allegations in the complaint as true. F.R. C.P. 12. Because the defendants did not present any proofs backing the claim offered by the attorney, the court when beyond its limits in granting immunity to these defendants based on attorney argument only. This holding in effect grants governmental employer/employee & agents, an immunity which is not expressed or intended by Congress. Effectively it denies anyone in plaintiff's position a remedy for wrongful conduct that Congress intended to correct. There has to be some evidences that a governmental function was being performed and it must be presented to the court by the defendants. The mere stating of an attorney, "We're government, we have immunity," was not what Congress had in mind in granting immunity to officials claiming governmental immunity.

PETITION'S THIRD ARGUMENT

The decision of the Court of Appeals for the Sixth Circuit is in conflict with Statute 42 U.S.C. 1983 and MCL. 691.1407.

The decision of the Court of Appeals for the Sixth Circuit and the U.S. District Court, is in conflict with 42 U.S.C. 1983 and MCL 691.1407, along with the procedure provided in the rules of evidences.

In the case at Bar, defense presented no evidence to the Court to back their attorney's claim of governmental immunity. The U.S. District Court dismiss the claims within its Court and dismissed plaintiff's claims on the presentation of hearsay with no evidence to even back up the hearsay by the defense attorney. One would have to question if the Appeals Court even read Plaintiff's Appeal and documents presented in the Appeal to the Sixth Circuit. Petitioner has loss faith in the judicial system

and is concern as to whether the Supreme Court will even review this Pro se Wirt.

The Constitution and the Rights of this Plaintiff demands that this case be remanded back for trial on its merits.

PETITION'S FOURTH ARGUMENT

Pro Se litigants are not treated fairly.

This Pro Se Plaintiff knows that he has stated a claim which relief can be granted. All he is asking for is his right to trial and he knows that he will prevail.

Pro se Petitioner's pleading within his civil rights complaint are to be construed liberally and they are to be held to less stringent then pleadings drafted by lawyers. Signore v. City of Mckeeskport, Pa., 690 F. Supp. 200, affirmed 877 F.2d 54. Although this is the rule, some courts continue to mistreat Pro Se litigants as outsiders, not belonging, can't have knowledge of the law or of the court.

CONCLUSION

Congress intended that a person wrongfully acted upon by the government will have the right to a trial in the U.S. Court System. Because of the alleged acts committed by these defendant against this plaintiff and the violation of the procedure and lack of any evidences of any governmental function in the lower courts, the Supreme Court must make a ruling in this case. Whether the granting of governmental immunity, with no evidences that a governmental function was being performed, can or can not with stand the language within 42 U.S.C. 1983 and a defense under MCL 691.1407. In view of the case below, including the lack of any evidences of a governmental function being performed by the defendants, dismissal of petitioner's case was inappropriate. Congress intended that any Citizen being deprived of any rights, privileges, or immun-

ities secured by the Constitution and Laws, by any person, shall be liable to the party injured. This case should be remanded back for trial on its merits.

Respectfully Submitted,

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Pro Se for Petitioner,
LARRY L. FAIRCHILD

July 4, 1995

Larry L. Fairchild

Proof of Service of Service

I the undersigned, ceritifies that 3 copies of this Wirt of Certiorari was sent to the attorney for the defendants at their address of record by placing in the U.S. Postal system with postage prepaid.

Dated: July 12, 1995

Larry L. Fairchild

APPENDIX

LARRY L. FAIRCHILD, d/b/a FAIRCHILD WASTE CONTROL Plaintiff-Appellant

v.

BUENA VISTA TOWNSHIP, et al, Defendants/Appellee

NO. 94-1003

United States Court of Appeals, Sixth Circuit

April 12, 1995

Appeal from the United States District Court for the Eastern District of Michigan.

Before KENNDY and MILBURN, Circuit Judges, and WISEMAN, District Judge.

Leonard Green, Circuit Clerk:

Larry L. Fairchild appeals a district court order dismissing his civil rights complaint file under 42 U.S.C. ss 1983, which also alleged supplemental state law claims. The case has been referred to a panel of the court pursuant to rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34 (a).

Seeking monetrary relief, Fairchild sued Buena Vista Charter Township and officials and employees of the municipality in their individual and official capacities, alleging that: 1) the defendants searched his property in violation of the Fourth Amendment; 2) the defendants violated his equal protection and due process rights; 3) the defendants conspired to defame him; 4) the defendants' action in searching his property were negligent; 5) the defendants intentionally inflicted emotional distress oh him; and 6) the defendants trespassed on his property. Over Fairchild's objections, the district court adopted the magistrate judge's report and recommendation to dismiss the claims, concluding that all of Fairchild's federal claims and most of his state law claims did not state a claim for which relief could be granted under Fed. R. Civ. P. 12(b)(6). The court also concluded that Fairchild's only remaining state law claim of trespass did state

state a claim upon which relief could be granted; yet, the court dismissed the claim without prejudice to Fairchild's right to pursue the claim in state court. Fairchild has filed a timely appeal.

Upon review, we conclude that the district court properly dismissed Fairchild's complaint for failure to state a claim. When Fairchild's complaint is construed in the light most favorable to him and all his factual allegations are accepted as true, the district court properly determined that Fairchild undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). Fairchild's Fourth Amendment claims do not state a claim, because the defendants properly searched his property and he has not alleged that they damaged any property. See Crowder v. Sinyard, 884 F.2d 804, 818 (5th Cir. 1989), cert. denied,

496 U. S. 924 (1990); United States v Brand, 556 F.2d 1312, 1317 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978); see also Bonds v. Cox, 20 kF.3d 697, 701-02 (6th Cir. 1994), His equal protection claim is conclusory and insufficient to state a claim. See Morgan v. Chruch's Fried Chicken, 829 F.2d 12 (6th Cir. 1987). His due process claim also fails to state a claim, because the defendants properly turned off his utilities without notice due to the existence of dangerous conditions on Fairchild's property. See Harris v City of Akron, 20 F.3d 1396, 1401 (6th Cir.) cert. denied, 115 S. St. 512 (1994). The defendants are immune from suit on Fairchild's claims of defamation, neagligence, and intentional infliction of emotional distress, because government employees engaging in the exercise or discharge of a governmental function are immune from tort liability. See Peterman v. Department

of Natural Res. 521 N.W. 2d 499, 512 (Mich. 1994); see also City of Rochester Hills v. Six Star, Ltd., 4k23 N.W. 2d 322 (Mich. App. 1988) (per curiam). Lastly, we note that Fairchild does not challenge the district court's dismissal of his sole remaining state law claim of trespass without prejudice in order to allow him to pursue this claim in state court.

Accordingly, we affirm the judgment for the reasons set forth in the magistrate judge's report and recommendation filed on April 8, 1993, as adopted by the district court in its order filed on Novermber 29, 1993. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green, _____
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 92-Cv-10085-BC

LARRY L. FAIRCHILD, d/b/a FAIRCHILD WASTE CONTROL,
Plaintiff,

v.

BUENA VISTA CHARTER TOWNSHIP, THOMAS LYNCH III, individually and Officially, JOHN PARROTT, individually and Officially, ROBERT PARENT, individually and Officially, DENNIS WILLIAMS, individually and officially, JULIUS BOARDEN, individually and officially, and STEVEN BENNETT, individually and officially,
Defendants.

JUDGEMENT

The Court has reviewed the pleadings and the Report and Recommendation of the magistrate judge filed in this case. The Court concurs with and adopts such Report and Recommendation.

Now, therefore, IT IS ADJUDGED that the oral Motion for Summary Judgment and for Costs made by plaintiff is DENIED. The Motion for Dismissal filed by defendants is GRANTED as to each count

other than the plaintiff's claim for trespass, and the case is DISMISSED.

Plaintiff's claim for trespass is DISMISSED WITHOUT PREJUDICE.

/s/ ROBERT H. CLELAND
United States Distric Judge

Dated: November 29, 1993

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case NO. 92-CV-10085-BC

LARRY L. FAIRCHILD, d/b/a FAIRCHILD WASTE CONTROL
Plaintiff

v.

BUENA VISTA CHARTER TOWNSHIP, et al.
Defendants.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS

1. INTRODUCTION AND FACTS

Pending, pursuant to an Order of Reference, is Defendants' Motion entitled, "Defendants' Motion to Dismiss." Oral argument was held on March 9, 1993.

Plaintiff, Larry L. Fairchild, doing business as Fairchild Waste Control, operated a recycling business in Buena Vista Township, Saginaw County, Michigan. Plaintiff, in his pro se complaint, alleges that on October 30, 19 91, the Michigan Department of Natural Resources entered his bus-

iness premises with a search warrant in order to search the premises for evidence of violations and to seize certain items. At approximately the same time, plaintiff alleges that defendants Thomas Lynch, Fire Marshal; John Parrott, Fire Chief; Robert Parent, Electrical Inspector; Dennis Williams, Building Inspector; Julius Boarden, Code Enforcement Officer; and Steven Bennett, Police Department Sergeant, all employees of Buena Vista Township, also entered his premises to conduct an inspection. Plaintiff alleges that prior to coming to his place of business, the DNR representatives and the defendants met at a Saginaw restaurant to discuss putting Fairchild out of business.

Plaintiff asserts that he requested the defendants to leave, since he was already being detained by the Department of Natural Resources. Defendants refused to leave. Plaintiff asked Sergeant Bennett to remove defendants from his premises. Plaintiff alleges that Sergeant Ben-

nett stated, "If you don't shut-up, I will arrest you for obstruction of justice." Further, plaintiff alleges that defendant Lynch stated, "The reason were here is to put you out of business because we don't like you." Plaintiff alleges that the defendants remained on his property for over three hours, taking pictures, entering every room, and listening to conversations between plaintiff and the DNR. Plaintiff alleges that while on the premises, one of the defendants telephoned Consumer Power Company, directing the utility to shut off the electricity and natural gas service to his entire property due to the existence of a fire. Consumers Power Company did turn off plaintiff's power.

On November 4, 1991, plaintiff received an ex parte temporary restraining order, from Saginaw County Circuit Court, signed by Judge Leopold P. Borrello, requiring the restoration of electrical and natural gas to plaintiff's property. (Plaintiff's Second Amended Complaint, Ex.A). A

stipulated injunctive relief order was issued on November 22, 1991. The order required plaintiff to "make immediate arrangements to make the electrical box, wires and the transformers which are in the grinder area exposed to dust from the grinder dusttight and within code specifications." (Plaintiff's Second Amended Complaint, Ex. B). Plaintiff alleges that although he fixed the alleged violations, defendants failed or refused to reinspect the premises. On February 18, 1992, plaintiff alleges the Township filed an ex parte motion against plaintiff for contempt for violating the stipulated order. Judge Borrello found plaintiff in contempt and authorized the termination of electric and gas services to the plaintiff's premises.

Plaintiff's second amended complaint contains five counts; civil conspiracy, civil rights violations, intentional infliction of emotional distress, trespass and constitutional violations of his civil rights, under 42 U.S.C. ss 1983.

II. ANALYSIS

A. Motion Standard

Defendants originally filed this Motion to Dismiss pursuant to Fed. R. Civ. 12(b). Due to plaintiff's pro se status and concerns relating to the necessity for reviewing matters outside the pleadings themselves, an order entitled, "Order on Petition for Clarification," was filed stating that I intended to treat defendants' motion to dismiss as a motion for summary judgment. After hearing oral argument and recognizing now that defendants do not in fact rely on matters outside the pleadings in their motion, I will treat defendants' motion as a Motion for Judgment on the pleading pursuant to Fed. R. Civ. P. 12(c).

In considering this motion, the court must accept all factual allegations in the complaint as true and grant the motion only when no material issue of fact exists entitling the moving party to judgment as a matter of law. Paskvan

v. City of Cleveland Civil Service Com'n,. 946 F2d 1233, 1235 (6th Cir. 1991).

B. Conspiracy

Plaintiff alleges that defendants conspired to discredit his business and good name and "deprive him of his opportunity of earning his liveliness". Plaintiff's allegations are premised on a conspiracy theory, and as such, plaintiff must prove that "two or more persons" acted in concert in causing him damage. Rosenberg v. Rosenberg Brothers Special Account, 134 Mich. App. 342, 351 N.W.2d 563 (1984). Plaintiff asserts two conspiracy theories: (1) defendants within separate municipal departments of the Township conspired together or (2) defendants and the DNR conspired together. Plaintiff alleges that defendant Boarden admitted that all defendants met with the Michigan Department of Natural Resources and Saginaw County officials at a restaurant prior to coming to plaintiff's property on October 30, 1991.

Defendants assert that plaintiff's conspiracy claim fails by virtue of the intra-corporation conspiracy theory. Under this theory, a municipal corporation cannot conspire with its own employees or agents. Hull v. Cuyahoga Valley Board of Education, 926 F.2d 5 05, 509 (6th Cir. 1991). There, in rejecting plaintiff's conspiracy claim against the Board of Education, its superintendent, its Executive Director and School administrator, the court held that employees of the board of Education could not form a conspiracy because they were the same entity. The court stated:

> This court has adopted the general rule in civil conspiracy cases that a corporation cannot conspire with its own agents or employees. Doherty v. American Motors Corp., 728 F.2d 334, 339 (6th Cir. 1984). Although the doctrine was first developed in the context of antitrust litigation, this court in Doherty stated, "[T]he same rule has been consistently applied in allegations of conspiracy under the Civil Rights Act." Id. This court in Doherty agreed with a second circuit decision Herrmann v Moore, 576 F.2d 453 (2nd Cir. 1978), which applied the "intra-corporate conspiracy" doctrine to bar the plaintiff's

> ss 1985(2) claim. In Herrman, the plaintiff had alleged a conspiracy between an education corporation, the Brooklyn Law Scholl, and its trustees and employees. In the present case, plaintiff is alleging a conspiracy between a school district superintendent, the executive director of the district, and a school adminstrator, all of whom are employees or agents of the Board. Since all of the defendants are members of the same collective entity, there are not two separate "people" to form a conspiracy.

Id. at 509-10

Plaintiff alleges that each of the individual defendant are employees of Buena Vista Charter Township. Thus, I suggest plaintiff's complaint fails to assert a conspiracy claim because these defendant cannot legally conspire with one another while acting as employees or agents of Buena Vista Charter Township. However, in response to this motion, plaintiff alleges that defendants conspired with members of the MDNR and possibly others which plaintiff may uncover in discovery. Plaintiff argues that he would seek to amend his complaint to add these parties as defendants if necessary. The focus of a civil conspiracy claim in Michigan

is on the damage, not the conspiracy itself. In re Rospatch Securities Litigation, 760 F. Supp. 1239, 1265 (W.D.Mich. 1991); Magid v. Oak Park Raquet Club Associates, LTD., 84 Mich. App. 522 529, 269 N.W. 2d 661 (1978). It appears that plaintiff alleges defendant engaged in a conspiracy with its purpose being to defame his business and reputation. However, because I suggest that plaintiff fails to state a defamation claim, his conspiracy claim, I suggest fails.

Plaintiff alleges defendants and the other alleged conspirators made false statements concerning his business. Specifically plaintiff alleges statements were made regarding:

> [his] violation of DNR regulations of landfill dump site; failing to clean up violations; his place of business is in effect on the EPA list of compassionated sites; that many of the recyclables that have been deposited there are mixed with garbage and in their opinion they do not constitute a health hazard and is currently commingling garbage with recyclables in violation of a court order.

(Second Amended Complaint P 3.3) It appears that plaintiff is alleging that these statements were made at municipal hearing in the City of Saginaw, city and township of Frankenmuth and Bridgeport and county of Saginaw, during legal proceeding before Judge Borrelo, in the presence of attorney Robert Strobel and W.S. Bovill, as well as to the Saginaw News. (Id.) In support of the alleged statements, plaintiff has attached to his complaint letters written by attorneys Stroebel and Bovill. Neither of the letters, however, indicate that the statements were made by any of the defendants in this action. The letter address litigation matters, as well as attorney opinions. A reading of these letters, I suggest, makes clear that plaintiff's defamation allegations concerns statements which were made in the course of judicial proceedings. Such statements are absolutely privileged regardless of their falsity if they are pertinent or relevant to the matters

at issue. Sanders v Leeson Air Conditioning Corp., 362 Mich. 692, 695, 108 N.W. 2d 761 (1961).

Defendants assert that plaintiff fails to state a claim for defamation, citing as authority, Gonyea v. Motor Parts Federal Credit Union, 192 Mich. App. 74, 480 N.W. 2d297 (1991). There the court stated that it is the plaintiff's burden when seeking a defamation claim to specifically plead: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statements irrespective of special harm, or the existence of special harm caused by the publication. Id. at 77. The court in Gonyea, stated that plaintiff must specifically plead "allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words and the publication of the alleged defamatory words." Id. The court held that the plaintiff is required to state to

whom publication was made.

Plaintiff generally asserts that allegedly defamatory statements were made to various municipalities and to the Saginaw News. Plaintiff however does not allege that statements were made to anyone other than Judge Borrello and the two attorneys. Plaintiff's arguments fail to over come the fact that the statements contained in the letters attached to plaintiff's complaint arose out of judicial proceedings. Further, none of these statements are themselves attributable to any of the defendants. As a result, I suggest that plaintiff's defamation claim and his claim of a conspiracy based upon that defamation both fail.

C. Negligence and Civil Rights Violation

Plaintiff's second cause of action is confusing since he alleges it states a claim for negligence and a civil rights violation. Plaintiff alleges that he has adequately pleaded the elements of negligence, and that defendants' actions con-

stitute deliberate indifference to his rights. Defendants allege that they are entitled to governmental immunity from plaintiff's negligence claims. Defendant Lynch first asserts that as the Fire Marshal, he is entitled to absolute governmental immunity under Mich. Comp. Law ss 691.1407(5), which states:

> Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune to tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or executive authority:

Defendant Lynch cites Meadows v. Detroit, 164 Mich. App. 418 , 418 N.W. 2d 100 (1987), where the Michigan Court of Appeals granted to the Detroit Chief of Police immunity under section 691.1407(5). There, the court stated that City Charter provides that the Chief of Police is the highest executive officer of the police department. At this point, the record does not indicate whether the fire marshall is the highest executive officer

of the fire department. But in the event the other defendants are afforded governmental immunity under the general provisions of Michigan law, the fire marshall also is entitled to immunity.

Mich. Comp. Law ss 691.1407 provides immunity to all agency employees. The statue states in applicable part:

> (1) Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity if affirmed.
>
> (2) Except as other wise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of governmental agency shall be immune from tort liability for injuries to persons or damages to property caused by the officer, employee, or member while in the course of employment or service or volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believe he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer's, employee's, member's', or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether and injury results. 1

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1 Mich. Comp. Laws ss 691.1401 defines governmental agency as the state, political subdivisions and municipal corporations. A municipal corporation includes a charter township. Thus, the Charter Township of Buena Vista is a municipal corporation. A "governmental function" is defined as activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance or other law. Mich. Comp. Laws ss 691.1401(f)

In Rochester Hills v. Six Star Ltd. 167 Mich. App. 703, 423 N.W. 2d 322 (1988), the city was granted immunity from liability for abuse of civil process for filing a complaint which required the defendants to comply with local ordinances. The defendant alleged that the city filed the complaint

merely to harm his business. The court determined that the city's action was a legitimate attempt to enforce the city's zoning ordinances.

As in Rochester Hills, plaintiff here alleges defendants had an ulterior motive to put him out of business. However, defendants' actions in causing the shut-off of his utilities, were, I suggest, a proper exercise of a governmental function, as defendants were enforcing the township's electrical code. Plaintiff's allegations of bad faith fail to defeat Michigan's statutory grant of immunity. Plaintiff was cited for violating a township ordinance. He filed a lawsuit in state court where he entered into a stipulated injunctive relief order which provided plaintiff a means by which his utility service could be restored. For whatever reason, plaintiff failed to comply with that agreement, and the state court found plaintiff in contempt. At this point, plaintiff has only himself to blame for not having his power and

business restored. Under these circumstances, I suggest, defendants are entitled to immunity, and plaintiff has failed to allege facts which defeat this defense. See, Hunley v Phillips 164 Mich. App. 517, 417 N.W.2d 485 (1987).

D. Municipal Liability

I further suggest that defendant Buena Vista Township is entitled to governmental immunity for its alleged actions arising out of the operation of the fire department, police department and building enforcement department. In Makris v. Grosse Pointe Park, 180 Mich. App. 545, 448, N.W.2d 352 (1989), the court stated:

> "A governmental agency is immune from tort liability when 'engaged in the exercise or discharge of a governmental function'. MCLA 691.1407 (1); MSA 3.996 (107)(1). Our Supreme Court has defined governmental function as 'an activity which is authorized by constitution, statute or other law,' Ross v Consumer Power, 420 Mich 567, 620; 363 NW 2d 641 (1984), and has specified that maintaining a police force is a governmental function. Ross, 420 Mich 625. Legislators and the highest executive officials at all levels of government are absolutely immune from tort liability when acting within their legislative or executive

authority. Ross, 420 Mich 633. Thus, the city of Grose Pointe Park and its officials are entitled to immunity from tort liability for activities related to the operation of a police force. Plaintiff has failed to state a claim for negligence on which relief can be granted against this defendant. The municipal defendants are entitled to summary disposition..." Markis, at pp. 5557-558. Id. at 557-58

Defendant Buena Vista Township asserts that plaintiff cannot maintain a section 1983 cause of action because he fails to plead and prove a deprivation of a constitutional right caused by a government policy or custom. In Monnell v Department of Social Services of New York, 436 U.S. 658 (1978), the court concluded that a municipality cannot be held liable under section 1983 on a respondeat superior theory of liability. However, where plaintiff sues government officials in their official capacity, seeking to impose liability on

a governmental entity, plaintiff must show that implementation of an official policy caused the alleged deprivation.

> More is required in an official-capacity action, however, for a governmental entity is liable under ss 1983 only when the entity itself is a "moving force'" behind the deprivation, Polk County v Dodson, 454 US 312, 326, 70 LEd2d 509, 102 S Ct 445 (1981) (quoting Monnell, supra, at 694, 56 LEd2d 611, 98 S Ct 2018); thus, in an official-capacity suit the entity's "policy or custom" must have played a part in the violation of federal law.

Kentucky v. Graham, 473 U.S. 159, 166 (1985).

Where the policy is not unconstitutional, plaintiff must prove more than simply a single incident to establish fault, on the part of the municipality, for an alleged violation of a constitutional right. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). In Fecteau v. Unknown Officers and Agents of Clinton Township, 596 F. Supp. 580 (E.D. Mich. 1984), this court set forth the standards for a motion to dismiss based on plaintiff's failure to allege municipal policy.

> Given the requirements articulated by the Sixth Circuit, the question remains as to what type of pleadings are required to overcome a motion to dismiss. The Court believes that it is necessary that in addition to allegations concerning a single incident involving the plaintiff, the plaintiff must plead some facts which indicate the particular manner in which the government entity adopted an impermissible policy. Appletree v. City of Hartford, 555 F. Supp. 224 (D.C. Conn. 1983). In a case of police misconduct, this requirement would be the most commonly met by pleading the existence of other similar incidents. Mui v. Dietz, 559 F. Supp. 485 (N.D. Ill. 1983). The Court bases this conclusion on more than the above-cited authorities. The Court believes that this pleading requirement

> effectuates the policies of F.R.Civ.P. 8(a)(2) for without such pleadings, defendants would not have fair notice of what the plaintiff's claim is and the grounds on which it rests. Moreover, the Court is of the opinion that this requirement serves to provide a mechanism for identifying meritorious Section 1983 claims early in the course of litigation: A policy which is specifically endorsed by the Supreme Court, and by inference, the Sixth Circuit. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Vicory v. Walton Sheriff, et al., 721 F.2d 1062 (6th Cir. 1983).

Id. at 583.

Plaintiff makes allegations that the Township failed to properly train defendants and negligently hired defendants. Plaintiff must sufficiently allege that the Township acted with deliverate indifference to plaintiff's rights in these alleged failures. City of Canton, Ohio v. Harris, 489 U.S. 378 91989); Lewis v. City of Irvine, Ky, 899 F.2d 451 (6th Cir. 1990). Plaintiff fails to allege these prerequisites, or the existence of an empermissible policy or custom adopted by the Township. Therefore,

I suggest plaintiff fails to meet his burden.

E. Intentional Infliction of Emotional Distress

Defendants first assert that they are entitled to immunity from plaintiff's intentional infliction of emotional distress claim pursuant to Mich. Comp. Laws § 691.1407(2). However, subsection (3) of that section states, "Subsection (2) shall not be construed as altering the law of intentional torts as it existed prior to the effective date of subsection (2)." Courts interpreting that section have held there is no intentional tort exception to governmental immunity. Giddings v. City of Detroit, 178 Mich. App. 749, 444 N.W.2d 242 (1989); Smith v. Department of Public Health, 428 Mich. 540, 410 N.W.2d 749 (1987) aff'd. 109 S.Ct. 2304, 105 L.Ed.2d 45. Thus, as long as the alleged intentional tort was committed in performance of a governmental function, governmental immunity applies. In the instant case, defendant cited plaintiff for violations of the electrical code. This was

done in performance of defendants' duties as township employees. Therefore, I suggest defendants' actions were taken in performance of a governmental function.

Further, it appears the plaintiff cannot satisfy the prima facie elements of intentional infliction of emotional distress. The Michigan Supreme Court adopted the elements for intentional infliction of emotional distress set forth in the Second Restatement of Torts: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. Roberts v. Auto Owners Insurance Co., 422 Mich. 594, 374 N.W.2d 905 (1985); see Second Restatement, Torts § 46.

As to the first element and outrageous conduct is described as conduct "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Id. at 6093, citing Restatement Torts, 2d, § 46, comment d, pp. 72-73. While plaintiff merely alleges that defendants' actions were ex-

treme and outrageous, he fails to specifically state how these actions defy the bounds of decency, or are "utterly intolerable in a civilized community." Defendants simply cited plaintiff for violations of township ordinances. Nothing that defendants did, as alleged by plaintiff, I suggest, arises to the level of extreme and outrageous conduct.

F. Trespass

Plaintiff asserts that defendants had no legal right to enter his premises. Further, even if defendants had a legal right to be on plaintiff's premises, plaintiff argues that they exceeded their legal authority and can be liable for trespassing.

> In Michigan, trespass has been definded to be any unauthorized intrusion or invasion of the private premises or lands of another. An initially authorized presence on one's premises may become a trespass if, for some reason, the authorization becomes invalid. Normally, a public officer who is on the premises of another pursuant to legal authorization, is not liable for trespass. Such officier becomes liable, however, where he acts in excess of his authority.

Antkiewicz v. Motorists Mut. Ins., 91 Mich. App. 389, 396, 283 N.W.2d 749 (1979), leave to appeal denied in part and vacated in part, 407 Mich. 936, 285 N.W.2d 659 (1979).

The Michigan Supreme Court recognized a limited trespass-nuisance exception to governmental immunity in Hadfield v. Oakland Co. Drain Commissioner, 430 Mich. 139. 422 N.W.2d 205 (1988). The court held:

> Therefore, we find that plaintiffs will successfully avoid a governmental immunity defense whenever they allege and prove a cause of action in trespass or intruding nuisance. Trespass-nuisance shall be defined as trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government).

Id. at 169. Plaintiff alleges that defendants physically invaded his private property and interfered with his use and enjoyment of his land. I suggest that, taking these allegations as true, plaintiff has properly plead an exception to governmental immunity.

Defendants assert that Mich. Comp. Laws § 29.8 gives the fire marshal authority and relief from liability for trespass for entering a premises at any reasonable hour for purposes of inspection and examination. That section states in part:

> The state fire marshal, or the chief of an organized fire department regular or voluntary, or a fire fighter in uniform acting under the orders and directions of the local fire chief; or the clerk of a city, village, township, or county not having an organized fire department, or the managing head or an organized fire district in this state, upon complaint of a person having an interest in a building or premises or property adjacent to a building or premises, or at the official's own instance without a complaint and without restraint or liability for trespass, may at an hour reasonable under the circumstances involved, enter into and upon a building or premises within the official's jurisdictions for the purpose of inspections and examination of the building or premises, together with their occupancies and contents, for the discovery of the existence of a fire hazard.

Plaintiff asserts that this section only allows Fire Chief Robert Parent relief from trespass liability and not the other defendants. Further, plaintiff argues that since he was already detained by the DNR under the circumstances, defendants entered his

premises at an unreasonable hour, and their refusal to leave when requested violates the specific language of § 29.8.

I suggest that plaintiff's allegations state a claim and at this point defendants' assertion of §29.8 raises at least a factual issue which cannot be resolved in the context of this motion. Alternatively, defendants assert that they were lawfully on plaintiff's property and were invited pursuant to the Department of Natural Resources' search warrant. However defendants' assert this fact in the context of of a Rule 12(c) motion. I suggest that this assertion goes to the factual merits of the case and is more proper in a Rule 56 summary judgment motion. In addition, defendants have failed to support this claim by affidavits or exhibits. Defendants have also failed to present the search warrant for this court's review. On this bases, and for the reasons set forth earlier, I am and remain unwilling to convert this motion into

one brought under Rule 56.[2] I suggest that plaintiff has properly stated a claim of trespass sufficient at this stage to withstand dismissal.

G. **Qualified Immunity**

Defendants also argue that their qualified immunity provides a defense to plaintiff's allegations. Procunier v. Navarette, 434 U.S. 555 (1978). Plaintiff alleges equal protection, due process and Fourth Amendment search and seizure violations. A government official is entitled to qualified immunity if the official's conduct does not violate clearly established law. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

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[2]Nor do I intend to imply or suggest that if defendants prove they were invited on the premises at the request of the DNR, they were therefore justified in entering plaintiff's premises. This issue, I suggest, is better left for resolution, if defendants choose to revisit it, in a subsequent motion for summary judgment.

To invoke qualified immunity, the Sixth Circuit has framed the question as whether "any officer in defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." Dominque v. Telb, 831 F.2d 673, 676 (6th Cir. 1987). Plaintiff has the ultimate burden of showing that defendant violated clearly established law. "Once the issue of qualified immunity is properly injected in the case either by a motion to dismess, an affirmative defense, or a motion for summary judgment, the plaintiff is obliged to present facts which if true would constitute a violation of clearly established law." Id. at 677. Recently, the Sixth Circuit stated:

> ...to survive a qualified immunity claim, a plaintiff must show not only that the officer's conduct deprived him of a constitutional right, but also that the officer reasonably should have known that the conduct violated clearly established law. See Dominque v. Telb, 831 F.2d 673, 677 (6th Cir. 1987). Thus, the dismissal of a claim against an officer asserting qualified immunity in no way

> logically entails that the plaintiff suffered no constitutional deprivation, nor, correspondingly, that a municipality (which, of course, is not entitled to qualified immunity) may not be liable for that deprivation. At most it means that an officer in the defendant's position could reasonably have believed that the conduct in question did not violate law that was clearly established at the time.

Doe v. Sullivan County, Tennessee, 956 F.2d 545, 554 (6th Cir. 1992).

Plaintiff, in showing that defendant violated a clearly established right, must do more than state in broad generalities that defendant violated his constitutional rights. Anderson v. Creighton, 483 U.S. 635 (1987). The Sixth Circuit recently explained the need for a specific assertion of the right violated.

> We recognize that there is no definitive guide as to when a right is "clearly established." Zweibon v. Mitchell, 720 F.2d 162, 168-69 (D.C. Cir. 1983). "The right in question, however, cannot be simply a generalized right, like the right to due process." Danese v. Asman, 875 F.2d 1239, 1242 (6th Cir. 1989) (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987). See also Garvie, 845 F.2d at 650-52. The Supreme Court, concerned that the artful pleader could convert the rule of qualified immunity into a rule of virtually unqualified liability by alleging a violation of extremely abstract rights, recently stressed that the right allegedly violated must have been clearly

> established in a more particularized sense. Anderson, 483 U.S. at 640. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id. Simply put, while official action is not necessarily protected by qualified immunity unless and until the very action in question has been held unlawful, id., the unlawfulness must be apparent in light of pre-existing law. Malley v. Briggs, 475 U.S. 335, 344-45 (1986).

Marsh v. Arn, 937 F.2d 1056, 1067 (6th Cir. 1991).

Plaintiff states that due process and equal protection rights were violated. However, plaintiff's utilities were ultimately shut off pursuant to court order, after a finding of contempt. I therefore suggest that plaintiff's allegations of a due process violation are clearly unfounded. Further, plaintiff has not stated how his equal protection rights were violated. It appears that he cannot support this claim.

Plaintiff asserts Uhl v. Ness City, Kansas, 406 F. Supp. 1012 (D.C. Kan. 1975), aff'd. 590 F.2d 839 (10th Cir. 1979), as authority for supporting his section 1983 claims. There, the court stated that "[t]he termination of utility services, pursuant to

municipal ordinances, is action taken under 'color of state law' for purposes of 42 U.S.C. ss 1983." Id. at 1016. In that case, the City turned off the water service of those residents who did not pay trash collection bills. The City Ordinance required that in order to have water service, the residents must pay for trash collection bills. The City Ordinance required that in order to have water service, the resident must pay for trash collection, and that a refusal to pay these charges would result in water service termination. Each of the resident plaintiffs, however, provided their own trash pickup and service. Therefore, they did not pay a municipal trash bill. Nevertheless, their water service was terminated by the City. The court concluded that by threatening to deprive residents of water, due process was violated because the municipality was the sole source of

water utility service. Therefore, the right to the service was a constitutionally protected entitlement, and arbitrary and unreasonable termination of the service violates due process standards. Plaintiff also cites Bradford v. Edelstein, 467 F. Supp. 1361 (S.D. Tex. 1979). In that case, utility customers brought an action against the Public Utility Board, alleging due process violations in the termination of utility service for failing to provide advance notice and an opportunity to contest termination for nonpayment.

Both Uhl and Bradford, however, involve the termination of residential utility services for nonpayment of bills for municipal service. The instant case is clearly distinguishable because the termination of plaintiff's power was effectuated due to an electrical code violation. As such, I suggest these cases are not authority for plaintiff's allegations in the instant case. Defendants

determined that a fire hazard existed on plaintiff's property, and were therefore, I suggest, justified in immediately terminating the utilities. Assuming that the termination of utility service for electrical code violations is a sufficient action to warrant a section 1983 cause of action, plaintiff, I suggest, nonetheless fails to overcome defendants' qualified immunity defense from liability.

H. Pendent State Claims

Since I am suggesting dismissal of all plaintiff's federal claims, and his only remaining claim (trespass) is premised on state law, I suggest that this court exercise its discretion and dismiss plaintiff's pendent state law trespass claim without prejudice, in order to allow plaintiff to pursue this claim, if he so chooses, in the state courts. See, United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Smith v. Dearborn financial Services, Inc. 982 F.2d 976,983 (6th Cir. 1993).

III. RECOMMENDATION

Accordingly, IT IS RECOMMENDED that defendant' motion is GRANTED IN PART AND DENIED IN PART as follows:

1) As to the civil conspiracy claim, the motion be DENIED;

2) As to the trespass claim, the motion be DENIED WITHOUT PREJUDICE; and,

3) As to all other claims, the motion be GRANTED.

IV. REVIEW

The parties to this action may object to and seek review of this Report and Recommenation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. section 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. United States v. Walters, 638, F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140, 106 S.Ct 466, 88 L.Ed.2d 435 (1985), Howard

v. Secretary of HHS, 932 F. 2d 505 (6th Cir. 1991). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. Smith v Detroit Fed'n of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991), Pursuant to E.D. Mich. LR.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

/s/ CHARLES E. BINDER
United States Magistrate Judge

DATED: April 7, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No. 92-CV-10085-BC

LARRY L. FAIRCHILD, d/b/a FAIRCHILD WASTE CONTROL

Plaintiff,

v.

BUENA VISTA CHARTER TOWNSHIP, et al.

Defendants.

ORDER OF DEFENDANTS' MOTION FOR CLARIFICATION AND AMENDMENT OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Pending, pursuant to an Order of Reference from United States District Judge Robert Cleland, is the above-entitled motion. Plaintiff has filed a response to the motion. Upon review of the pleadings, I conclude that pursuant to E.D. Mich. LR 7.1(e)(2), this motion is ready for decision without oral argument

Accordingly, IT IS HEREBY ORDERED THAT the Motion for Clarification Regarding Ma-

gistrate Binder's Report and Recommendation on Defendants' Motion to Dismiss is hereby GRANTED, and the recommendation section of the Report and Recommendation is hereby AMENDED to read as follows :

III. RECOMMENDATION

Accordingly, IT IS RECOMMENDED THAT:

1. As to plaintiff's pendent state law trespass claim, the motion be DENIED WITHOUT PREJUDICE so as to allow plaintiff to pursue this claim in the state courts; and

2. As to all other claims, the motion be GRANTED and the case DISMISSED.

Review of this Order is governed by E.D. Mich. LR 72. 1(d)(1). Pursuant to this local Rule, a copy of any objections is to be served upon this Magistrate Judge.

IT IS SO ORDER.

/s/ CHARLES E. BINDER
United States Magistrate Judge

DATED: MAY 13, 1993